IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No.

JOSEPH J. BRUNETTI CONSTRUCTION CO., INC.,
Petitioner,

vs.

THOMAS GRAY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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RULE CITED.

Rule 19(b) 5

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Joseph J. Brunetti Construction Co., Inc., prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled action pursuant to its decision dated April 24, 1959.

Opinions Below.

The opinion of the Court of Appeals (Kalodner, concurred in by Biggs, C. J. and McLaughlin) which reversed the District Court for the District of New Jersey (Worten-

dyke, *D. J.*) is contained in the Appendix, at pages 1 to 33; there were two opinions by the District Court, contained on pages 84a to 97a and pages 190a-197a of the Record. These opinions are reported in 159 F. Supp. 417 and in 161 F. Supp. 151.

Jurisdiction.

The judgment of the Court of Appeals was entered on April 24, 1959. Jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

Questions Presented.

1. Where, in a suit for attorneys fees for $13,000.00 based upon a contingency agreement, the plaintiff recovers a judgment for $7,500.00, and the defendant appeals (and no cross-appeal is filed by plaintiff) did the Circuit Court have the power, in reversing the judgment, to order the judgment entered for $13,000.00, though such relief was not sought, debated or argued by the Appellee?

2. Despite the fact that both parties to the suit tried the case upon the theory that the contingency agreement was subject to the review for reasonableness, is it proper for the Circuit Court, on its own, to find that the District Court was without jurisdiction of the subject matter in assessing the reasonable amount at $7,500.00 on the ground that the attorney was not licensed in New Jersey and accordingly, enter judgment for the $13,000.00?

3. Where a party demands a jury trial in a civil case, the subject of which involves a construction of a contract, and the reasonableness of an attorney's contingency fee contract, is it proper to deprive the party of a jury, upon the ground that the Court lacked jurisdiction of the subject matter?

4. Where an attorney licensed to practice law in Washington, D. C. enters into a contingency contract in New Jersey to render legal services in Washington, D. C., is it proper for the Circuit Court to hold that such contract is not subject to review as to reasonableness by the New Jersey Courts on the theory that the attorney is not a member of the New Jersey Bar?

Statement of the Case.

Plaintiff, a Washington, D. C. lawyer, sued defendant-petitioner herein, and one Joseph J. Brunetti individually, upon a written contract to render legal services. There was a dismissal as to the individual defendant. The contract provided for a payment of $12,000.00 in installments and subject to a contingency as fully set forth in the writing, an additional $13,000.00. The $12,000.00 installment payments were made. Petitioner refused to pay the $13,000.00. Plaintiff, both in its complaint and at trial, pleaded and argued that the contingency was met; that the amount of the contingency was reasonable and that the Court properly took proof as to the reasonableness of the amount of the contingency fee as it was obliged to do under New Jersey law involving an attorney's fee. Petitioner, in its answer and pursuant to the rule of Court, demanded a

jury trial and pleaded and argued that the contingency was not met; that if it was, then the fee was excessive and that the jury should determine the reasonable amount, if any, due plaintiff. (Complaint and Answer and Contract at R5a to 12a).

The trial court (being confronted with the question, among others, of whether the contract was ambiguous) first held that the contract was clear; that plaintiff met the contingency; that these questions were for the Court and hence refused to permit the jury to decide these issues. It likewise permitted petitioner an opportunity to present evidence to the Court without a jury as to whether the contingent fee was so excessive and so unreasonable as to compel a finding of over-reaching on the part of plaintiff. (First opinion at R84a-97a).

Petitioner sought the opportunity and accordingly, both parties produced evidence before the trial judge, sitting without a jury (as per the Court's order) as to the reasonableness of the fee. The Court then rendered its second opinion, concluding that $7,500.00 was "generous compensation to the plaintiff for the services which the Court finds that he rendered to the defendant under the contract in suit". (R190a-197a).

Petitioner appealed to the Circuit Court; no cross appeal was filed. In the briefs and upon the argument, plaintiff sought to affirm the $7,500.00 judgment and argued that the trial court correctly took the case from the jury and correctly reviewed the reasonableness and correctly found $7,500.00 as the reasonable compensation. Petitioner argued that the trial court erred in taking the case from the jury and erred in allowing $7,500.00 as reasonable.

In this posture, the Circuit Court did the following:

(a) It reversed the judgment below;

(b) It held that the trial judge correctly ruled that the contract entitled plaintiff to recover and correctly took the case from the jury;

(c) It held that the trial judge erred in taking proof as to the reasonableness of the fee, even though under New Jersey law contingency fee contracts may be subject to the jurisdiction of the Court;

(d) The trial judge was without jurisdiction to take proof of the reasonableness of the fee; and finally, ordered the entry of a judgment for $13,000.00 in place of $7,500.00. (Circuit Opinion at App. I, pg. 33).

Reasons for Granting Writ as to First Question Presented.

The ruling of the Court of Appeals poses the question of its right upon a defendant's appeal, to decide a matter upon an issue contrary to the theory of the case adopted by the parties and the trial judge, and neither argued nor briefed by any of the parties, and in the absence of a challenge of the verdict received by plaintiff, at trial, to increase the judgment for the plaintiff.

The anomaly of the situation created here presents the question as to whether the decision of the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings (Rule 19(b) of this Court) as to warrant a review. Plaintiff, in a suit upon a lawyer's contingency contract, recovers a judgment at trial for

$7,500.00; defendant files an appeal; plaintiff files no cross appeal, but argues to sustain the verdict below; the Court of Appeals on its own and upon an issue not argued or briefed or debated, rules that the Trial Court erred in allowing $7,500.00 and accordingly reverses and orders a judgment for plaintiff for $13,000.00.

It is axiomatic, as the Court below noted, that in the absence of a jurisdictional issue (App. pg 31 note) that an appellee "* * * can be heard * * * only in support of the decree which was rendered. Peoria & Pekin Union Railway Co. *vs.* U. S., 263 U. S. 528, 535 (1924); Helvering *vs.* Pfeiffer, 302 U. S. 247, 251 (1937); Morley Construction Co. *vs.* Maryland Casualty Co., 300 U. S. 185 (1937), rehearing denied 300 U. S. 687."

But the Court below, nevertheless, assumed the course taken and described, upon the theory that the trial judge lacked jurisdiction of the subject matter; hence, if the Court below had jurisdiction, then the action taken by the Court of Appeals is contra to well established, judicial proceedings.

In *Morley Construction Co.* vs. *Maryland Casualty Co.*, cited above, this Court granted certiorari to determine the measure of relief available to a non-appealing suitor; in that case, upon an appeal to the Eighth Circuit, with no cross appeal, the Court of Appeals modified the judgment below enlarging the rights of the respondent, commenting in part:

> "Without a cross-appeal, an appellee may urge in support of a decree any matter appearing in the record although his argument may involve an attack

upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it. U. S. *v.* American Railway Express Co., 265 U. S. 425, 435. What he may not do in the absence of a cross-appeal is to attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. Ibid. The rule is inveterate and certain." Citing cases.

As to the Second Question Presented.

In its effort to justify its decision, the Court of Appeals found that the District Court lacked jurisdiction of the subject matter (App. pgs. 30 and 31). Actually, it decided that since the District Court found that the contingency contract for the lawyer's fee was not founded on fraud and was fairly entered into, the trial judge lacked jurisdiction of the subject matter in ruling that evidence would be allowed (and this without objection by plaintiff) and taking of proof of reasonableness and fixing the alleged reasonable amount of recovery.

It is respectfully urged that the trial judge had jurisdiction of the subject matter; that his ruling was subject to review, if challenged, and subject to reversal, if erroneous, and that the ruling of the Circuit Court that the trial court lacked jurisdiction of the subject matter is contra to decisions of other Circuit Courts of Appeal.

In *West Coast Exploration Co.* v. *McKay*, 213 Fed. (2nd) 582, 591, U. S. Court of Appeals District of Columbia (1954):

"In view of the confusion which seems to have arisen in the case with reference to the first aspect of the jurisdictional question, there are set forth below statements, in leading cases on the subject, which we think adequately describe the criteria for determination of the question whether a court has jurisdiction of a given proceeding:

"Jurisdiction is the power to decide a justiciable controversy, and includes questions of law as well as of fact. A complaint setting forth a substantial claim under a federal statute presents a case within the jurisdiction of the court as a federal court; and this jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged any more than upon the way it may decide as to the legal sufficiency of the facts proven.

* * * Jurisdiction, as distinguished from merits, is wanting only where the claim set forth in the complaint is so unsubstantial as to be frivolous or, in other words, is plainly without color of merit." (*Binderup* v. *Pathe Exchange, supra*, 263 U. S. at 305-306, 44 Sup. Ct. at 98.)

"By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred." (*Cooper* v. *Reynolds, supra*, 10 Wall. at 316, 19 L. Ed. 931.)

"* * * (J)urisdiction of the subject matter * * * 'is power to adjudge concerning the general question involved, and is not dependent upon the state of facts which may appear in a particular case, arising or which is claimed to have arisen, under that general question * * * It is the power to act upon the general,

and, so to speak, the abstract question, and to determine and adjudge whether the particular facts presented, call for the exercise of the abstract power'." (*Hughes* v. *Cuming, supra,* 165 N. Y. at 95, 58 N. E. at 795.)

"The jurisdiction with which we are concerned is the power to hear and determine a cause. It is not limited to making correct decisions but includes power to decide wrong as well as right. As applied to a particular controversy it is the power to hear and determine the subject-matter of that controversy. *And by this is meant the power to hear and determine causes of the class to which the particular controversy belongs.* It is the power to act upon the general question in its relation to the facts presented to adjudge whether such facts can call for the exercise of the abstract power." (Emphasis supplied) (*Brougham* v. *Oceanic Steam Navigating Co., supra,* 205 F. at 859.)

"Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint does not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction. Swafford *v.* Templeton, 185 U. S. 487, 493, 494, 22 Sup. Ct. 783, 46 L. Ed. 1005;

Binderup *v.* Pathe Exchange, 263 U. S. 291, 305-308, 44 Sup. Ct. 96, 68 L. Ed. 308. * * * The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly unsubstantiated and frivolous. The accuracy of calling these dismissals jurisdictional has been questioned. The Fair *v.* Kohler Die & Specialty Co., supra, 228 U. S. 22 at 25, 33 Sup. Ct. 410, 57 L. Ed. 716. But cf. Swafford *v.* Templeton, supra." (*Bell* v. *Hood, supra*, 327 U. S. at 682-683, 66 Sup. Ct. at 776.)

Murrell v. *Stock Growers' National Bank of Cheyenne*, 74 F. (2) 827 at 831 (C. C. A. 10th Cir. 1934):

> "Jurisdiction of the subject-matter is the power to hear and determine cases of the general class to which the proceedings in question belong. It does not depend upon the sufficiency of the complaint or petition, the ultimate establishing of the right to the relief sought, the regularity of the proceedings, or the correctness of the decision rendered."

In *Montgomery* v. *Equitable Life Assur. Soc.*, 83 Fed. (2) 758 (C. C. A. 7th Cir. 1936):

> "Jurisdiction of the subject matter is the power to inquire and adjudge whether the facts of a particular case make the case a proper one for jurisdictional consideration by the judge before whom it is brought. Lange *v.* Benedict, 73 N. Y. 12, 29 Am. Rep. 80. Jurisdiction of the subject matter is the power to decide concerning the general question involved. It is not the exercise of that power. If a

bill states a cause of action which belongs to a general class over which the court's authority extends, jurisdiction attaches and no error committed by the Court in the rendition of the judgment can render the judgment void. Miller *v.* Rowan, 251 Ill. 344, 96 N. E. 285. It is the power to decide, regardless of whether that decision be right or wrong. Gibbs *v.* Andrews, 299 Ill. 510, 132 N. E. 544. Jurisdiction does not depend upon the state of facts which may appear in a particular case arising, or which is claimed to have arisen under that general question. Hunt *v.* Hunt, 72 N. Y. 207."

In *Spencer* v. *Gypsy Oil Co.*, 143 Fed. (2) 935 (C. C. A. 10th Cir. 1944):

"Jurisdiction of the subject matter includes power to determine with binding effect every justiciable issue involved. Such jurisdiction is not limited to deciding issues correctly. Swift & Co. *v.* U. S., 276 U. S. 311, 48 Sup. Ct. 311, 72 L. Ed. 587. An erroneous decision is just as binding as a correct one if no appeal is taken therefrom."

In *Noxon Chemical Products Co.* v. *Leckie, et al.*, 39 F. (2) 318 (C. C. A. 3rd Cir. 1930):

"Jurisdiction of the subject matter is the power to hear and determine cases of the general class to which the proceedings in question belong; the power to deal with the general subject involved in the action."

"In the sense in which the term is ordinarily used, jurisdiction may be concisely stated to be the right of a court to act and adjudicate concerning the subject matter in a given cause. 7 R. C. L. 1029."

It would appear that the ruling of the Circuit Court, here sought to be reviewed, in holding that the District Court, having determined that the contingency fee contract was fairly entered into by the parties, was without jurisdiction in determining the reasonableness of the fee to be allowed, is in direct conflict with other decisions of the same Circuit as well as contra to decisions of this Court and of the various Circuit Courts quoted above.

As to Third and Fourth Questions Presented.

Petitioner, having demanded a jury trial in its initial pleading (R. page 12a) was deprived of the right to have the jury pass on the reasonableness of the compensation, if any, to which plaintiff was entitled. The Circuit Court approved this action based, in part, on the theory that the Court lacked jurisdiction on this issue. Despite the fact that the trial court and the pleadings and the parties recognized the suit as one to recover attorney's fees, based upon a contingent fee contract, the trial court deprived defendant of its right to a jury determination claiming only the Judge could decide the issue of reasonableness. (Rec. pg. 97a). The Circuit Court ruled that neither the judge nor the jury had the right to go into this issue (and this it did on its own) and upon the ground that the plaintiff, a member of the Bar of the District of Columbia, was not licensed to practice in New Jersey, and hence his contingent fee contract was not subject to the jurisdiction of the Courts. (App. pg. 30).

Hence, the ruling poses this paradox: If a New Jersey lawyer sues on a contingency contract, the defendant is

entitled to a jury trial, or a review by the Judge of the reasonableness of the fee; but if a New Jersey defendant is sued by an out of State lawyer for legal services rendered in and out of the State, then defendant is not entitled to have the Court or jury determine the reasonableness of the contract.

In this modern tempo of business and the closeness of State lines and the almost daily interstate traffic involving legal problems and necessitating retaining out of State lawyers, it seems that the public should have the protection of the Courts in its dealings with lawyers of different States to the same degree accorded them as if the lawyer was a member of the Bar of their own State.

It is respectfully submitted that the Circuit Court, in ruling as it did, on its own, upon a defendant's appeal to enlarge a judgment for plaintiff, in the absence of a cross-appeal, and in the absence of any suggestion so to do, and upon reasons not suggested, argued, or briefed, has departed from the long established practice governing appeals; additionally, the apparent novel concept of applying one rule of law to a suit by a licensed attorney of the State and another rule of law where the attorney is licensed by a sister State appears to require clarification; and finally, its conclusion that the trial court lacked jurisdiction of the subject matter is founded upon a theory contra to the rule of this Court and other Circuit Courts.

Conclusion.

For the foregoing reasons, it is respectfully requested that the petition for a writ of certiorari be granted.

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Dated: July 7, 1959.

APPENDIX 1.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,659

THOMAS GRAY

v.

JOSEPH J. BRUNETTI CONSTRUCTION CO., INC.,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued November 18, 1958

Before BIGGS, *Chief Judge* and MCLAUGHLIN and KALODNER, *Circuit Judges.*

OPINION OF THE COURT.

(Filed April 24, 1959.)

By KALODNER, *Circuit Judge.*

Defendant, Joseph J. Brunetti Construction Co., Inc., a New Jersey corporation, engaged in construction of apartment houses, appeals from a judgment rendered by the District Court of New Jersey in favor of plaintiff,

Thomas Gray, Washington, D.C. attorney and resident of Virginia.

The judgment was in an action based on a written contract for legal services entered into by the parties which provided for payment of a fixed fee of $12,000, not in controversy, and a contingent fee of $13,000.

The case is one in federal court by reason of diversity. It was tried to a jury. At the conclusion of plaintiff's case both parties moved for a directed verdict. Defendant's motion was denied; decision on plaintiff's motion was reserved. At the conclusion of defense testimony, the Court withdrew the case from the jury on the ground that construction of the contract was for the Court. At the same time it stated that it would treat the parties' earlier motions as motions for judgment. Subsequently the Court held[1] that defendant was not entitled to a directed verdict but that plaintiff was entitled to a judgment for the contingent fee, reserving, however, the right of the defendant to introduce evidence to the Court, sitting in equity and without a jury, for the purpose of determining the reasonableness of the contingent fee arrangement.

Thereafter, defendant submitted proof as to the reasonableness of the $13,000 contingent fee, and, after consideration, the Court entered judgment for plaintiff for $7,500, holding that sum to be reasonable.[2]

Defendant's appeal is based on these grounds: the District Court erred (1) in its construction of the contract; (2) in allowing plaintiff a $7,500 contingent fee and (3) in refusing to permit the jury to construe the contract and determine the issues.

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[1] *Gray v. Brunetti Construction Company, Inc.*, 159 F. Supp. 417 (D. C. N. J. 1958).

[2] *Gray v. Brunetti Construction Corp. Inc.*, 161 F. Supp. 151 (D. C. N. J. 1958).

These facts are undisputed:

Brunetti was engaged in the construction of apartment house projects which were financed by mortgages insured by the Federal Housing Administration ("F.H.A."), known as the "Title 608 program." Prior to May 27, 1955, the date of the retainer agreement here involved, F.H.A. launched investigations of its mortgage loans to builders and instituted proceedings against some of them to (1) "roll back" rents and/or procure refunds of past rental payments to tenants, (2) obtain refund of "windfall" profits, and (3) effect repayment of loans between parent and subsidiary building and operating companies. Defendant was aware of the action taken by F.H.A. with respect to other so-called 608 builders and consulted its local counsel, Walter Van Riper concerning its own situation. Joseph J. Brunetti, president of defendant, and its sole stockholder, had testified before the Senate Banking and Currency Committee with respect to its operations under the 608 program. Defendant felt that it would be advantageous to engage Washington, D.C. counsel to assist Van Riper in an anticipated dispute with F.H.A. and sought the services of plaintiff, who had been employed as one of counsel by F.H.A. for some thirteen years during 1938 to 1946 and 1948 to 1953, and was at the time in private practice, specializing in housing law and F.H.A. matters. Plaintiff, in response to Brunetti's request, came to Newark, New Jersey in the latter part of April or early in May, 1955 and conferred with Mr. Brunetti, Monroe Bober, defendant's secretary, Van Riper and a Mr. Apfel, defendant's accountant. In mid-May, in response to Bober's summons, plaintiff came to Newark for a conference in Van Riper's office with those earlier mentioned and was at that time retained as "behind-the-scenes" Washington counsel for defendant. Subsequently plaintiff and Mr. Brunetti met and agreed upon the terms and scope of plaintiff's representation.

Later, plaintiff and Bober drafted a letter dated May 27, 1955, memorializing the oral agreement, which was signed by plaintiff and Mr. Brunetti, in behalf of defendant, on May 31st.

Subsequently, Van Riper actively represented defendant in its dispute and negotiations with F.H.A. In accordance with the intentions of the parties, plaintiff remained in the background but throughout informed defendant and Van Riper, via telephone and letters, of developments with respect to activities of F.H.A. in 608 situations generally, and specifically advised them in connection with their negotiations with F.H.A. Conferences were held between defendant's representatives and plaintiff in his Washington office and in New Jersey. In September, 1955 plaintiff advised defendant with respect to demands made by F.H.A. that directors and officers of several of its subsidiaries resign to make way for F.H.A. appointees. In November, 1956 F.H.A. wrote defendant demanding, in settlement of its various claims, payment of $90,000 in reduction of mortgages of its subsidiaries. Indicative of the "behind-the-scenes" activity of plaintiff is the fact that, according to defendant, he informed it of the F.H.A. letter "a few days before that letter was mailed."[3] Later, in December, 1956, plaintiff advised defendant and Van Riper to make the

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[3] With respect to that incident, Monroe Bober, defendant's secretary, testified as follows (N. T. pp. 62-63):

"Q. Now, when you received that final letter, you just spoke about, from the F.H.A., turning down your proposition unless you paid the $90,000.00, was the fact communicated to Mr. Thomas Gray, the plaintiff in this case?

"A. *Well, actually, sir, Mr. Gray knew that that letter was going to come to us before we even got it, and it was a few days before that letter was mailed that Mr. Gray spoke to me on the phone at length about the situation with respect to the F.H.A.* We had agreed in November, *among ourselves, Mr. Gray, Judge Van Riper, and myself,* that the $90,000.00 that the F.H.A. was demanding would be acceptable to us if we did not have to apply it as we did to reduction of mortgages. * * *" (Emphasis supplied).

settlement proposed by F.H.A. and "of certain other things which were more important in our making of a decision".[4] Defendant made the settlement and plaintiff then demanded payment of his $13,000 contingent fee. Defendant refused to pay and plaintiff brought suit.

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[4] On this score Bober testified as follows (N. T. pp. 62-63):

"Early in December, and as my records and memory recall, it was on December 7, I spoke to Mr. Gray who was in Washington, and he advised me, as he had Judge Van Riper by letter, that the $90,000.00 was not bad, as he put it, in light of the stiffening attitude that the F.H.A. had been taking. *He also advised me of certain other things which were most important in our making of a decision.*

"Mr. Gray advised me that Mr. Wolf, who was the chief counsel for the F.H.A. and who had been doing the negotiations with us, had tendered his resignation and was leaving either January 1 or February 1 of 1956. He felt that if we got an unfavorable answer to our letter of November 28 to the F.H.A. asking that this money not be applied against mortgages, that, in that event, since this man that we had been doing business with was about to step out of the picture, then we would have to start all over again, going through this whole rigamarole of discussions and fighting and everything else; *he thought we should accept the Settlement. He so advised me.* As I understand, his advice was further communicated to Judge Van Riper.

"Q. Mr. Bober, as a result of the payment to the mortgagees of the $90,000.00, did the F.H.A. drop the action of compelling the meeting for the purpose of the resignation of officers and directors?

"A. Yes, he did.

"Q. Did they drop any further action against your company?

"A. They dropped all the threatened actions that they had implied against us, by writing us a letter accepting our offer of settlement.

"Q. That was due to the fact that you paid the $90,000.00, is that correct?

"A. Yes." (Emphasis supplied.)

The letter constituting the contract on which plaintiff's suit was based reads as follows:

"Joseph J. Brunetti Construction Co., Inc.
95 Essex Street, Maywood, New Jersey

May 27, 1955

"Mr. Thomas Gray
1720 'Eye' Street, N.W.
Washington 6, D.C.

"Dear Sir:

"This letter is written to confirm the oral understanding reached between yourself and the writer with respect to your professional services.

"You are to be retained by us to assist our counsel and ourselves in properly preparing and defending ourselves against any action of the Federal Housing Administration or its agents, or any agency of government acting in behalf of the Federal Housing Administration, in attempting to:

"A. Roll back rents and/or cause a refund of past rents to tenants.

"B. Cause a refunding of profits (FHA terminology 'windfalls').

"C. Cause loans between parent and subsidiary corporations to be repaid.

"D. Be successful in any other action, no matter what the allegation in accomplishing A, B, or C.

"It is understood that you will devote all the time required to assist both ourselves and our counsel in these matters.

"Upon the signing of this agreement, we shall pay you $3,000 as a retainer.

"For the year starting June 1, 1955, we shall pay you $750.00 per month.

"In the event that we are *successful in avoiding* litigation *or* in the event that we are *successful in litigation in preventing* the Federal Housing Administration, its agents or agencies of the government, as aforesaid, from causing any of *the aforementioned items to occur*, then we shall pay you an additional $13,000. Should the government be successful in the taking over of our corporations and setting up their own Board of Directors, your work shall include the assistance to us and counsel in preventing the government from accomplishing A, B, or C, during their period of direction, and also to assist us in having these corporations returned to our control in the fastest period of time. *Should we not be successful in any one of the counts, you will not be entitled to receive the aforementioned $13,000.*

"*It is understood that your monthly fee shall cease at the end of the year whether or not the matter has been brought to a successful conclusion. Your services will continue, however, after the year is up, and you shall only be entitled to receive from us the $13,000 mentioned above in the event of ultimate success on our part.*

"We agree to reimburse you for out-of-pocket expenses undertaken at our request.

"Should all of the above be in accordance with our agreement, please sign this letter in the space provided

below, retain the original for your files, and permit us to keep a duplicate copy.

Very truly yours,

Joseph J. Brunetti Construction Co., Inc.

/s/ JOSEPH J. BRUNETTI,
Joseph J. Brunetti
President

JJB:MB:NF

ACCEPTED: /s/ THOMAS S. GRAY

DATED: May 31, 1955." (emphasis supplied)

It is admitted that the foregoing letter embodies the entire contract between the parties and that plaintiff had performed the services for which he was paid the $3,000 retainer and $9,000 in twelve monthly payments of $750.00 each between June 1, 1955 and May 1, 1956.

Defendant here contends, inter alia, that the contract was ambiguous with respect to its contingent fee provisions and that its construction was accordingly a jury question; that the District Court erred in taking the question from the jury.

As long ago as 1805, Mr. Chief Justice Marshall stated, in *Levy* v. *Gadsby*, 7 U. S. 180, 186: "* * * no principle is more clearly settled, than that the construction of a written evidence (contract) is exclusively with the court." It is also settled that "Whether the written contract fully expressed the terms of the agreement * * *" is a question for the court. *Seitz* v. *The Brewers' Refrigerating Machine Company*, 141 U. S. 510, 517 (1891).

Further, it is settled that "Facts and circumstances attendant at the time the contract was made are competent evidence for the purpose of placing the court in the same situation, and giving the court the same advantages for

construing the contract which were possessed by the actors." *Good* v. *Martin*, 95 U. S. 90, 95 (1877). In *In re Kellet Aircraft Corp.*, 191 F. 2d 231, 235 (1951) we noted: "The well-known rule of construction that a court may give consideration to the subject matter of the contract and the surrounding circumstances * * *"

In the instant case the District Court acted in consonance with the decisions cited in taking the construction of the contract from the jury inasmuch as it had correctly determined after considering it that it was free from ambiguity.

Before proceeding to consider the proper construction to be placed on the contract we must determine what law to follow. This case is in Federal Court solely by reason of diversity. The Federal Court takes its applicable rule of law from the state courts of the District in which it sits and this, of course, includes its conflict of laws references to laws of other states where they are relevant. Accordingly, the District Court in the instant case was constrained, as we are, to apply the conflict of laws rule of New Jersey. The New Jersey conflict of laws rule is that ordinarily reference is to be made to the law of the place of contracting in construing the contract and determining the obligations of the parties. *Packard Englewood Motors* v. *Packard Motor Car Co.*, 215 F. 2d 503, 507 (3rd Cir. 1954); *Wilson* v. *Homestead Valve Manufacturing Co.*, 217 F. 2d 792, 797 (3rd Cir. 1954), cert. den. 349 U. S. 416; *Fairbanks, Morse & Co.* v. *Consolidated Fisheries Co.*, 190 F. 2d 817, 820 (3rd Cir. 1951); *Hinkly* v. *Freick*, 86 N. J. L. 281, 90 A. 1108 (1914); *James H. Rhodes & Co.* v. *Chausovsky*, 137 N. J. L. 459, 462, 60 A. 2d 623, 626 (1948); *Restatement, Conflict of Laws*, § 332 (1934).

The contract was made in New Jersey and involved performance on the part of the contracting parties in both Washington, D. C. and New Jersey. As the District Court

put it, it provided, as far as plaintiff was concerned, that he was to act "* * * as an on-the-spot look-out (in Washington) and practical advisor in the interest of the defendant and the latter's New Jersey counsel." The District Court found that "In the performance of such functions the plaintiff reported to the defendant or its counsel [in New Jersey] from time to time by telephone, letter or in person"; "Conferences were held by defendant's representatives with the plaintiff at Washington and in New Jersey * * *" and "It was the intention of both parties that plaintiff should remain in the background during the negotiations between defendant, its counsel and the [Federal Housing] Administration." 159 F. Supp. 417, 422.

In view of the fact that the plaintiff was engaged, under the contract, "* * * to assist our [defendants] counsel and ourselves [defendant] in properly preparing and defending ourselves against any action of the Federal Housing Administration * * *" and such assistance, via plaintiff's advice, was communicated to defendant and or its counsel in New Jersey it is a fair conclusion that performance was largely centered in the state of New Jersey.[5] Taking into account that fact and the making of the contract in New Jersey the conclusion is justified that New Jersey law is applicable in matters relating to the construction of the contract.

In construing integrated contracts the New Jersey courts permit introduction of parol evidence as to "* * * the relation of the parties and the circumstances under which the contract was made, and the objects which the parties were thereby to accomplish * * * not for the pur-

[5] Even though by reason of partial performance in Washington, D.C. consideration should be given to standards of construction there prevailing, the result would be the same since the New Jersey rule of construction is in accord with the Federal rule. *Good* v. *Martin*, 95 U. S. 90, 95 (1877). "The question of whether an ambiguity exists in a contract is one of law to be determined by the court." *Friedman* v. *Thomas J. Fisher & Co.*, Municipal Court of Appeals for the District of Columbia, 88 A. 2d 321, 323 (1952).

pose of changing the writing, but to secure light by which to ascertain its actual significance." *Corn Exchange National Bank & Trust Co. of Philadelphia* v. *Taubel*, 113 N. J. L. 603, 609-10, 175 A. 55, 58 (1934). *Restatement, Contracts*, 230 (1932).

The New Jersey rule was spelled out in *Atlantic Northern Airlines, Inc.* v. *Schwimmer*, 12 N. J. 293, 96 A. 2d 652, 656 (1953):

> "Evidence of the circumstances is always admissible in aid of the interpretation of an integrated agreement. This is so even when the contract on its face is free from ambiguity. The polestar of construction is the intention of the parties to the contract as revealed by the language used, taken as an entirety; and, *in the quest for the intention*, the situation of the parties, the attendant circumstances, and the objects they were thereby striving to attain are necessarily to be regarded. The admission of evidence of extrinsic facts is not for the purpose of changing the writing, but to secure light by which to measure its actual significance. Such evidence is adducible only for the purpose of interpreting the writing—not for the purpose of modifying or enlarging or curtailing its terms, but to aid in determining the meaning of what has been said . . . ." (Emphasis supplied).

Applying the principles stated we find no error in the holding of the District Court that this was an integrated contract and in its consideration of evidence of surrounding circumstances. Indeed, defendant does not here contend that the District Court erred in considering such evidence; it merely asserts that the Court erred in its evaluation and its construction of the contract in the light of it, and further, in refusing to permit the issue as to both to go to the jury. There is no basis for defendant's contentions. The

District Court properly refused to leave to the jury the construction of the contract in view of its correct holding that this was an integrated contract, free of any ambiguity. Further, its construction of the contract and evaluation of the evidence as to "surroundings" is amply sustained by the record.

There remains for consideration the question as to the allowance of the contingent fee of $7,500.

It would serve no useful purpose to review in detail the District Court's holding that the plaintiff was entitled to a contingent fee under his contract with defendant. As stated, the contract was free of any ambiguity. It provided that the fixed contingent fee of $13,000 would be paid in the event of defendant's "ultimate success" in its disputes with F.H.A. The phrase "ultimate success" referred to "avoiding litigation" or "litigation" which might develop. Defendant by paying $90,000 in reduction of the mortgages of its subsidiaries settled its disputes with F.H.A. and "avoided litigation".

> As the District Court put it (159 F. Supp. 417, 422, 423):
> "For the purpose of buying its peace and thereby avoiding litigation, defendant succeeded in negotiating a settlement with the Administration [F.H.A.] involving a payment of $90,000 in the form of a refund of 'windfall' profits. The accomplishment of its compromise with the Administration has rendered successful defendant's efforts to avoid litigation, and thereby created the condition precedent to plaintiff's right to payment of the contingent fee as provided in the contract. Defendant's 'ultimate success' entitling the plaintiff to receive the additional $13,000 is found in its relief from the types of previously threatened consequences of action by the Administration.
> "The Court finds, therefore, that defendant was 'successful in avoiding litigation' with the Federal Housing

Administration respecting actions taken or threatened by it as contemplated by the parties to the agreement here in suit. Efforts toward the achievement of such utimate avoidance of litigation were among the professional obligations which plaintiff assumed under the contract. It is obvious that the parties contemplated that such efforts might have to be continued beyond the period during which the attorney would be entitled to receive the monthly payments on account of his retainer. Indeed, they did extend to November, 1956. It is not to be assumed that the parties intended that such further services, if successful, should be unrewarded * * *"

The record discloses that the area of dispute between defendant and F.H.A. embraced loans of more than $1,100,000 made to the defendant by its subsidiaries which F.H.A. contended were in violation of law; refunding of more than a $1,000,000 of asserted construction profits or "windfalls" (the excess of the amount of mortgages insured by F.H.A. over the actual cost of the projects securing the mortgages),[6] and, a refund of past rents, and a roll-back of future rents, calculated by the plaintiff to amount to $194,000 annually over the life of the mortgages insured by F.H.A.

Plaintiff testified that the amounts in controversy were considered by the parties in the determination of his contractual fees. In response to defendant's request that he "describe the circumstances that surrounded the fee arrangement you made in connection with this contract with

[6] Defendant, through its secretary, Monroe Bober, denied that more than $1,000,000 in "windfalls" was involved. He testified that "The questionnaires that we then proceeded to deliver to the F.H.A. showed a windfall on the companies that we still owned * * * of $236,135.55 on 18 of the corporations. It was a consolidated questionnaire. With respect to one single other corporation, there was a windfall of $10,215.83."

the Joseph J. Brunetti Construction Company", he said (N.T. p. 85):

> "At the time of the discussion of the contract in Judge Van Riper's office, in which Mr. Bober ended the conversation very early, and previous to that conversation I was told that there was something in the neighborhood of $1,300,000 in windfalls, something in excess of $1,000,000 in loans——
>
> "Mr. Heller [defendant's counsel]: May I interrupt the witness? He said he was told. Was it by these people?
>
> "The Witness [plaintiff]: By Mr. Apfel—Mr. Bober confirmed—by Mr. Brunetti, something in excess of $1,000,000 in loans, and $200—in excess of $200,000 a year in rent, two items of which I confirmed with information which I already had by virtue of having followed the windfall investigations and the testimony in Washington before the Senate. *It was with respect to those amounts that the discussion was held in connection with a fee* * * *" (emphasis supplied.)

In its opinion, 161 F. Supp. 151, 154, the District Court made the fact-finding that "* * * the agreement was arrived at after apparent complete disclosure and full consideration and there was no fraudulent or unfair conduct on the part of the attorney [plaintiff]." It specifically noted (p. 155) that Mr. Brunetti, defendant's sole stockholder, who had directly negotiated with plaintiff the scope and terms of his representation had "* * * offered no testimony respecting the circumstances surrounding the manifested mutual assent of the parties leading to the achievement of the agreement, the correctness of the written embodiment of the agreement which he personally signed in his official capacity [as president], or of the fairness or reasonableness of the amounts required to be paid in accordance with the terms thereof." Mr. Brunetti's failure

to testify, "despite his conceded availability", said the District Court, supported an inference that his testimony "if given * * * would have been unfavorable * * *" to defendant.

With respect to the fee allowed, the District Court, after observing that it "* * * had the benefit of expert testimony respecting the issue of the reasonableness of the contingent fee * * *" said (p. 155):

> "* * * an additional fee of $7,500 appears to afford, in the Court's opinion, generous compensation to the plaintiff for the services which the Court finds that he rendered to the defendant under the contract in suit."

We are of the opinion that the record amply sustains the District Court's fact-findings that the contract was fairly made and the plaintiff performed the services it contemplated.

The District Court's reduction of the $13,000 contingent fee specified in the contract presents a problem not considered by the District Court or the parties. It arises by reason of the fact that both the District Court and the parties assumed[7] that "summary jurisdiction" existed with respect to the contingent fee since plaintiff is an attorney and under New Jersey law the courts of that state are vested with such jurisdiction over attorney's fees because attorneys "* * * are officers of the respective courts in which they practice." *Lynde* v. *Lynde*, 64 N. J. Eq. 736, 52 A. 694, 697 (E. & A. 1902); *Hughes* v. *Eisner*, 14 N. J. Super. 58, 81 A. 2d 394, 397 (1951).[8]

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[7] Plaintiff assumed the District Court in the exercise of its equitable jurisdiction could act wth respect to the contingent fee; defendant assumed below, and here contends, that the jury could, and should have passed on the issue.

[8] See also *Soper* v. *Bilder*, 87 N. J. Eq. 564, 100 A. 858 (1917) and *Steiner* v. *Stein*, 2 N. J. 367, 66 A. 2d 719 (1949).

There is nothing in the record to establish that plaintiff had been admitted to practice, or practiced in the New Jersey state courts.[9] The testimony discloses that plaintiff is a member of the State of Georgia and District of Columbia bars. The circumstance that one is an attorney does not automatically qualify him to practice before courts to which he has not been admitted. Since he was not admitted to practice in the New Jersey state courts he was not an officer of the courts mentioned and there was a lack of summary jurisdiction to review his contractual contingent fee under New Jersey law.

Moreover, since the plaintiff had not been admitted to practice before the court below, it lacked independent jurisdiction to exercise the "* * * autonomous control over the conduct of their officers" which inure to federal courts. *Theard v. United States*, 354 U. S. 278, 281 (1957), because it is well settled that attorneys are only officers of the federal courts to which they have been admitted to practice. Ex Parte Bradley, 74 U. S. (7 Wall.) 364, 367 (1869).[10]

Even though the issue was not raised, "a lack of jurisdiction in the district court over the subject matter" requires us to reverse the District Court's action in reviewing and reducing plaintiff's contingent fee. In *Peoria & Pekin Union Railway Company v. United States*, 263 U. S. 528 (1924) the Court said (p. 535-36):

> "If there were a lack of jurisdiction in the district court over the subject matter, we should be obliged to

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[9] In his brief plaintiff stated that he was "an officer" of the New Jersey courts but that statement is evidently based on his mistaken conception that an attorney is "an officer" of any and all courts even though he has not been admitted to practice before them.

[10] In *Spilker v. Hankin*, 188 F. 2d 35 (D. C. Cir. 1951) it was said (p. 37):

> "In a very real sense attorneys are officers of the courts in which they practice * * *."

take notice of the defect, even if not urged below by the appellee * * *."[11]

This too must be said.

This was in the nature of an action at law and necessarily so because a suit by an attorney against his client to recover on a contingent fee contract had to be brought at law and could not be maintained in equity. See *Trist* v. *Child*, 88 U. S. (21 Wall.) 441, 447 (1875).

Once it was found by the District Court in its construction and consideration of the contract that it was fairly made after full consideration of the impact of its terms upon the parties, and that its terms had been performed by plaintiff, he was entitled to judgment for the $13,000 contingent fee provided by the contract.

The New Jersey law is well-settled and explicit in this respect.

In the leading case of *Kupfersmith* v. *Delaware Insurance Co.*, 84 N. J. L. 271, 275, 86 A. 399, 401 (1913) it was said:

> "The law will not make a better contract for parties than they themselves have seen fit to enter into, or alter it for the benefit of one party and to the detriment of the other. The judicial function of a court of law is to enforce a contract as it is written."

In affirming the principle stated, the Superior Court of New Jersey, Chancery Division, in the recently decided case of *Leeds and Lippincott* v. *Nevius*, 51 N. J. Super. 343, 144 A. 2d 4, 10 (1958) said:

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[11] We are cognizant of the line of cases which hold that an appellee "* * * can be heard * * * only in support of the decree which was rendered." *Peoria & Pekin Union Railway Co.* v. *U. S.*, 263 U. S. 528, 535 (1924); *Helvering* v. *Pfeiffer*, 302 U. S. 247, 251 (1937); *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U. S. 185 (1937), rehearing denied 300 U. S. 687, but they did not present any jurisdictional issue.

"The rule is firmly established that the parties are bound by the agreement which they have made."[12]

The New Jersey rule is in accord with that prevailing in other jurisdictions.[13]

The New Jersey courts, even in equity proceedings, "* * * may not justly invoke the extraordinary power of declining to enforce the fairly executed * * * agreement of the parties solely because the material benefits afforded to the defendant presently appear to be rather meager." *DeCaro* v. *DeCaro*, 13 N. J. 36, 97 A. 2d 658, 662 (1953).

It must be observed, parenthetically, that the District Court erred still another respect in reducing plaintiff's contingent fee even assuming it enjoyed summary jurisdiction with respect to it. It is settled New Jersey law that attorney-client contracts for contingent fees "* * * should not be carved away by the court except in an entirely clear case." *Hughes* v. *Eisner*, *supra*, and, in the absence of unfairness or fraud, where there has been performance by the attorney, the contract "* * * ought not be disturbed by the court, but the parties should be left where they have placed themselves." *Grimm* v. *Franklin*, 102 N. J. Eq. 198, 140 A. 236, 239 (1928), affirmed 146 A. 914 (E. & A. 1929).

Here the District Court found fairness, absence of fraud, performance of the terms of the contract, and (assuming jurisdiction) should have left the contract undisturbed.

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[12] Other New Jersey decisions, citing and applying *Kupferschmith* v. *Delaware Insurance Co.* are: *Smith* v. *Fidelity & Deposit Co. of Maryland*, 98 N. J. L. 534, 120 A. 322, 323 (1923); *Jorgenson* v. *Metropolitan Life Ins. Co.*, 136 N. J. L. 148, 55 A. 2d 2, 4 (1947).

[13] *Harnish* v. *Shannon*, 392 Pa. 419, 141 A. 2d 347, 351 (1958); *Stinson* v. *New York Life Ins. Co.*, 167 F. 2d 233, 235 (D. C. Cir. 1948); 17 C. J. S. Contracts, § 417; 12 Am. Jur., Contracts, § 184; 3 Williston on Contracts, § 620, p. 1788 (1936). The rule was concisely stated by Williston as follows:

"But the mere fact that parties have made an improvident bargain will not lead a court to make unnatural implications or artificial interpretations. A court will not under the guise of interpretation write a new contract for the parties."

In summary, we find that the District Court correctly found that the contract was not ambiguous and accordingly properly took its construction from the jury; that it did not err in its construction of the contract and in its fact-finding that it has been fairly negotiated and performed; that the Court, in reducing the contingent fee, erred in exercising a "summary jurisdiction", which it did not possess; it further erred in not entering judgment for plaintiff for his contractual contingent fee of $13,000.

For the reasons stated the judgment of the District Court will be reversed and the cause remanded with instructions to proceed in accordance with this opinion.

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FILED
AUG 13 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 197.

JOSEPH J. BRUNETTI CONSTRUCTION CO., INC.,

Petitioner,

vs.

THOMAS GRAY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Counter-statement of Questions Presented.

1. Does a United States District Court in New Jersey have the "summary jurisdiction" to consider the reduction of a written contingent fee agreement between a client and an attorney not admitted to practice before it or before New Jersey Courts after it has decided that there is no fraud or overreaching and that this was the agreement both parties decided to adopt after a full disclosure of the facts?

2. Does the United States Circuit Court of Appeals have the authority and power to consider a jurisdictional question affecting the right of a United States District Court to consider a matter when this jurisdictional question is raised neither by the court below nor the parties?

3. Does the United States District Court have the authority to decide the meaning of a written agreement when the same is clear and unambiguous?

Counter-statement of the Case.

Plaintiff in this case was an attorney admitted to practice before the bars of the District of Columbia and the State of Georgia. He had offices located in the District wherein he practiced law specializing in general housing and Federal Housing Administration matters. He entered into a written contract to represent the defendant in connection with difficulties arising out of certain apartment dwellings constructed under the Federal Housing Administration program. This agreement by defendant's own statement and the decision of the District Court correctly and totally embodied the intentions of the respective parties. (Appellant's Circuit Appendix, p. 62.)

The District Court in its opinion filed February 26, 1958, stated that the action was one at law for breach of an express written contract couched in common English terms and devoid of technical and abstruse verbiage. Therefore, the Court interpreted the agreement as a matter of law and dismissed the jury. The Court, at this time, further clarified its position by stating there was no suggestion of mistake, mutual or unilateral, and that neither party sought reformation or cancellation of the contract.

It was then finally held by the Court that under its interpretation of the contingency contract plaintiff was entitled to recover $13,000.00, but restricted it by providing an opportunity for defendant to come before the Court within a specified time to present evidence that the amount of the contingent fee provided in the contract was so excessive or unreasonable as to compel a finding that the plaintiff intended to overreach. The Court was to decide this as a Court of Equity. Taking advantage of the opportunity, defendant had witnesses appear before the Court and the plaintiff countered by offering evidence concerning the

reasonableness of the fee. In reducing the fee the District Court stated that under New Jersey law when a fee agreement between attorney and client is questioned by the client, a Court in the exercise of its equitable discretion will sustain the agreement only to the degree of securing reasonable compensation for the attorney. Based upon this theory the judgment was entered for $7,500.00 rather than the $13,000.00 provided in the contract. (Appellant's Circuit Appendix, pp. 195, 196.)

Defendant appealed this decision to the United States Court of Appeals for the Third Circuit. There was no cross appeal by the plaintiff.

The Circuit Court after reviewing the briefs and hearing the oral arguments reached the following conclusions and issued its mandate accordingly (App. I, p. 33):

1. The District Court correctly found that the contract was not ambiguous and properly took its construction from the jury;

2. The District Court did not err in its construction of the contract and in its fact finding that it had been fairly negotiated and performed;

3. The District Court erred in exercising a "summary jurisdiction" which it did not possess when it reduced the contingent fee;

4. The District Court further erred in not entering judgment for plaintiff for his contractual fee of $13,000.00.

The Circuit Court fully realized the issue of jurisdiction had not been raised by the Court or the parties below and that plaintiff-appellee had not raised it on appeal; however, it held that when a jurisdictional question is presented the Court may take cognizance of it nonetheless. (App. I, pp. 30, 31.)